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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 359.

UNITED MINE WORKERS OF AMERICA and UNITED MINE WORKERS OF AMERICA, DISTRICT 19,
Petitioners,
vs.
OSBORNE MINING COMPANY, INC.,
Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF.

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J. G. Ray & Sons Co. v. NLRB, 251 F. 2d 771 (1st Cir., 1958) 4

Local 24, International Brotherhood of Teamsters v. NLRB, 266 F. 2d 675 (C. A. D. C., 1959) 4

Lustig v. United States, 338 U. S. 74, 77 3

Matter of A. M. Greene, 49 N. L. R. B. 146 2

NLRB v. Business Mach. and Office Appliance Mechanics Conference Board, Local 459, 228 F. 2d 553 (2d Cir., 1955) 4

NLRB v. Hearst Publication, Inc., 322 U. S. 111 (1944) 3

Offutt v. United States, 348 U. S. 11, 15 3

United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344 7

United Mine Workers of America v. Meadow Creek Coal Co., 263 F. 2d 52 (6th Cir., 1959), cert. denied 359 U. S. 1013 (1959) 6, 7

United Mine Workers of America v. Patton, 211 F. 2d 742 (4th Cir., 1954) 6, 8

United States v. Standard Oil Company, 332 U. S. 301 5

United States v. United States Gypsum Co., 333 U. S. 364, 394 3

Statutes Cited.

29 U. S. C., Sec. 187 ..... 1, 2, 3, 4, 6

41 U. S. C., Sec. 35 et seq. 2

Textbook Cited.

Law and the National Labor Policy, by Archibald Cox, Institute of Industrial Relations, University of California, Los Angeles, 1960, page 35 4

Miscellaneous Cited.

House Report on Education and Labor, 80th Congress, 1st Session, Miscellaneous, Vol. 2, p. 18 3

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Petitioners will not attempt to reply, seriatim, to Osborne's[1] arguments opposing the petition for certiorari, since petitioners believe that answers thereto are contained in the petition. Petitioners further believe, however, that a reply to the following matters will be helpful to the Court.

I.

1. The Conditions of Work Obtaining in the Mines Operated by Osborne's Sublessees Are a Relevant Part of the Factual Basis for the Determination of Whether the Sublessees Were Neutral or Secondary Employers Under Section 303 (29 U. S. C., Sec. 187).

On page 3 in the Osborne brief it is said that petitioners have referred to the working condi ions in the sublessee

[1] The respondent, Osborne Mining Company, Inc., is sometimes referred to herein as "Osborne."

mines to prejudice this Court against Osborne, and that petitioners have not stated the relevance of the subject to any issue in the case.

This subject is germane to the issue of whether the sublessees were neutral employers under Section 303. As stated in the petition (p. 16), "elemental economic circumstances plainly indicate" the dependence of the sublessees and their employees on Osborne. These circumstances, which gave Osborne practical control over sublessees as in **Matter of A. M. Greene**, 49 N. L. R. B. 146, are found in the control it had over the area's large mining tracts, in its ability to create small areas for sublessee mines as it strip mined the outcrop coal by its own employees, in the size of the subleased tracts which precluded other than a 3 to 6 man "punch mine" or "dog hole" type non-mechanical operation, and in the price it paid for coal (R. I, 95-96, 116; R. II, 680-681; R. III, 1535). According to Osborne's engineer the workers in these mines produced five or six tons of coal per man "on a normal day" (R. II, 681). Kentucky Department of Mines indicates the average is 3.96 tons (R. III, 1584). In either event, estimating a net of about $1.50 per ton to the sublessee (R. III, 1586; R. III, 1809), the indicated daily wage of sublessee's coal miner[2] was far less than the $2.245 hourly rate found by the Secretary of Labor under the Walsh-Healey Act (41 U. S. C., Sec. 35, et seq.) to be the prevailing wage in the area in November, 1955 (R. III, 1686; 20 F. R. 5690). No one can seriously insist that sublessees of this type, and their employees, were not totally dependent upon Osborne or that they were not a part of a unified effort by Osborne to mine coal for the fulfillment of its contracts.

Petitioners thus emphatically deny that they have referred to this subject merely to prejudice the respondent.

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[2] See cross-examination of Osborne's witness, Henry Baker (R. II, 743-745).

2. No Significance Should Attach to the Concurrence of the Courts Below in Finding That the Sublessees and Truckers Were Neutral Employers.

On page 8 of its brief Osborne states that the "presence or absence of the factual strands of control is a factual question" and that the "question has been settled by concurrent findings of both lower courts."

Petitioners contend that the concurrence of the lower courts on the question indicated is of no significance on the issue of whether the sublessees and truckers were neutral employers under Section 303. This issue is not simply an issue to be determined by factual findings on questions of control. It is one in which an "issue of law [is] entwined"—the issue of whether and to what extent an independent contractor may not be a neutral in the dispute of another. As such, review of the issue is not foreclosed by the concurrent finding. **Lustig v. United States**, 338 U. S. 74, 77; see also **Offutt v. United States**, 348 U. S. 11, 15; **United States v. United States Gypsum Co.**, 333 U. S. 364, 394.

3. Petitioners' Theory Regarding the Sublessees and the Truckers Is Not Contrary to Law.

Because of the change made by the Taft-Hartley Act in the definition of the term "employee" the respondent argues that petitioners' theory is contrary to law.

As a frequently quoted House Report[3] makes clear, the purpose of the change was to overrule the decision of this Court in **NLRB v. Hearst Publication, Inc.**, 322 U. S. 111 (1944). The change in the law, however, was not con-

[3] House Report on Education and Labor to 80th Congress, 1st Session, Miscellaneous, Vol. 2, p. 18. The material language of the report is set forth on pages 10-11 of the respondent's brief.

cerned with the question of whether an independent contractor was, by virtue of that status, a neutral employer to all other independent contractors.

The Court of Appeals' interpretation of Section 303, as pointed out in the petition at pages 16-17, was never intended by Congress. The Act's chief sponsor during the Congressional debate said that an employer acting "as a part of the primary employer" is not a neutral employer (see petition, footnotes 14 and 15, page 16). Moreover, the courts have not accorded a literal meaning to Section 303. Recently Mr. Archibald Cox aptly observed that, "The neutrality of the secondary employer varies within such wide limits that the courts have already read two exceptions into the statute . . .":[4] (1) the so-called "ally" rule under which an employer who accepts work from a strike-bound employer is not considered a neutral employer with regard to the dispute;[5] and (2) the affiliate rule under which wholly owned subsidiaries have not been regarded as disinterested neutrals.[6]

Justice demanded that a literal interpretation of the statute not be made in the two situations noted by Mr. Cox just as it demanded that such an interpretation not be made in **Local 24, International Brotherhood of Teamsters v. NLRB**, 266 F. 2d 675 (C. A. D. C., 1959), where it was found that one of two operationally-integrated businesses was not so unconcerned with the dispute of the other as to be "statutorily shielded as a neutral" in the dispute.

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[4] *Law and the National Labor Policy*, by Archibald Cox. Institute of Industrial Relations, University of California, Los Angeles, 1960, page 35.

[5] *NLRB v. Business Mach. and Office Appliance Mechanics Conference Board, Local 459*, 228 F. 2d 553 (2d Cir., 1955).

[6] *J. G. Ray & Sons Co. v. NLRB*, 251 F. 2d 771 (1st Cir., 1958).

Thus it is clear that the contention of petitioners regarding the sublessees and the truckers is not contrary to law but that it is akin to decisions in which courts have rejected a literal interpretation of the Act where justice so required.

II.

1. The Petitioners Properly Referred to Other Cases in Which the Question of Ancillary or Pendent Jurisdiction Here Before the Court Is Also Involved.

Osborne criticizes (brief, page 15) petitioners for having set forth in their petition the list of pending cases against UMW in which the question of ancillary or pendent jurisdiction is necessarily involved.

The reference to these other cases is proper and, moreover, it is helpful to the Court. It accords with the grant of certiorari in **United States v. Standard Oil Company**, 332 U. S. 301, where this Court said that the grant had been prompted by the importance of the case as reflected in the Government's assertion, in its petition for certiorari, that the case was representative of a number of pending and prospective suits.[7] See also **Brown v. Board of Education of Topeka**, 344 U. S. 1, where this Court took "judicial notice" of a case pending before the United States Court of Appeals for the District of Columbia in which a question was posed similar to a question in three other cases then pending on certiorari.

On pages 16 through 18 of its brief the respondent has undertaken in a discussion of matters admittedly off the record to explain the situation which gave rise to the list

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[7] *United States v. Standard Oil Company*, 332 U. S. 301, 302, footnote 2.

of pending cases referred to in the petition. This discussion affords no basis upon which the erroneous application of a jurisdictional doctrine may be justified and inasmuch as such matters are not factually germane to any issue presented by this petition, we deem it unnecessary to discuss them.

2. Judicial Authority Does Not Sustain the Assertion of Federal Jurisdiction Over a State Cause of Action Joined With an Action Under Section 303.

Respondent argues (brief, page 20) that numerous cases sustain the Sixth Circuit's application of the doctrine of pendent jurisdiction in the instant case and (brief, page 19) that the **Apex,**[8] **Crumboch**[9] and **Patton**[10] decisions are all distinguishable in that there was no assertion of the doctrine of pendent jurisdiction by the respective plaintiffs therein.

It must be noted, in answer to this argument, that in none of the cases cited by respondent, other than **Meadow Creek,**[11] has the doctrine of pendent jurisdiction been applied for the purpose of asserting jurisdiction over an alleged state cause joined with an action under Section 303. This is of much significance because at the time of enactment of Section 303 Congress intentionally withheld from the Federal Courts jurisdiction over the very issues upon which, in its common law aspects, the present case was decided. See petition, pages 24-25.

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[8] *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1940).

[9] *Hunt v. Crumboch*, 325 U. S. 821 (1945).

[10] *United Mine Workers of America v. Patton*, 211 F. 2d 742 (4th Cir., 1954).

[11] *United Mine Workers of America v. Meadow Creek Coal Co.*, 263 F. 2d 52 (6th Cir., 1959), cert. denied 359 U. S. 1013 (1959).

Unless this Court reviews and reverses the pattern now established and followed by the Sixth Circuit in **Meadow Creek** and the present case, Congressional will and intention, clearly manifested in its refusal to make actionable in Federal Courts suits based upon acts of interference other than those within Section 303, will be totally thwarted and Federal jurisdiction of state causes of action in labor controversies will have been established, not by Congressional enactment, but through the process of judicial legislation.

Respondent's contention (brief, pafe 19), that **Apex** is distinguishable from the present case because no discussion is had in that opinion of the pendent jurisdiction doctrine, overlooks the positive denial therein by this Court of the authority of Federal Courts, under circumstances comparable to those of the case at bar, to enforce state laws. This language cannot be explained away in terms of a litigant's failure to assert the pendent jurisdiction doctrine. The fundamental power of the Federal judiciary is not as gossamer as respondent's suggestion implies.

Also without merit is respondent's argument that **Apex** is distinguishable from the instant case on the basis that **Apex** asserted no "colorable" Federal claim for decision, and accordingly the doctrine of pendent jurisdiction could not have been applied therein. **Apex**, however, was in its time and is today regarded as a milestone in a line of difficult cases involving the application of the Sherman Act to the activities of organized labor. When it is considered that actions of labor similar in an objective sense to those involved in **Apex** had been held, prior to **Apex**, to be violative of the Sherman Act (See **United Mine Workers of America v. Coronado Coal Co.**, 259 U. S. 344, the first **Coronado** case), the contention that there was no "colorable" Federal cause involved in **Apex** is fallacious.

Respondent's argument that **Patton** (211 F. 2d 742) did not involve the doctrine of pendent jurisdiction is not in accord with published reports of the opinion of the District Court (114 F. Supp. 596) and the Court of Appeals therein, both of which decisions are discussed on pages 29 and 30 of our petition.

III.

1. A Finding That Petitioners Were Responsible for Certain Acts Which Occurred During the Dispute Does Not Justify the Conclusion That Petitioners Had "Inspired" and Were Therefore Responsible for Other Acts.

In response to petitioners' third ground for granting certiorari the respondent, without discussing the particular matters referred to by petitioners, says that the "entire record" supports the conclusion of liability reached by the District Court and the Court of Appeals. The respondent further states (brief, page 24) that petitioners have not challenged all of the findings, but only "the connection of the Union to a few isolated incidents" taken "out of the context of the District Court's over-all findings."

It is quite true that petitioners do not seek review of the vast body of facts in this case. Petitioners insist only that the lower courts erred in certain of the material conclusions wherein it is found that petitioners had "inspired" certain acts and were responsible therefor. Liability of anyone under any set of circumstances surely must be predicated on something more substantial than this extraordinary imputation.

Petitioners say that the standard of responsibility adopted by the District Court and approved by the Court of Appeals is indefensible. The rule indicated is of great

importance in the administration of justice as it relates to the role of organized labor in this country and requires review by certiorari of the case.

Respectfully submitted,

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